

**To:** Polly, P. David[pdpolly@indiana.edu]  
**Cc:** Shimada, Kenshu[KSHIMADA@depaul.edu]  
**From:** Foss, Scott  
**Sent:** 2017-03-30T11:02:04-04:00  
**Importance:** Normal  
**Subject:** Re: Executive Order, Promoting Energy Independence  
**Received:** 2017-03-30T11:02:34-04:00  
[Yoo & Gaziano 2017, Presidential Authority to Revoke or Reduce National Monument Designations.pdf](#)  
[Yoo & Gaziano 2017, Presidential Authority to Revoke or Reduce National Monument Designations, summary.pdf](#)

I don't mean to overload you, but the Yoo & Gaziano analysis is out today. It contradicts the Arnold & Porter conclusion. (attached)

S

On Thu, Mar 30, 2017 at 9:18 AM, Foss, Scott <[sfoss@blm.gov](mailto:sfoss@blm.gov)> wrote:

Good observation.

On Thu, Mar 30, 2017 at 9:16 AM, Polly, P. David <[pdpolly@indiana.edu](mailto:pdpolly@indiana.edu)> wrote:

The Secretary moves faster on energy than on fossil protection! Thanks for the pointer.

On 30 Mar 2017, at 9:13 AM, Foss, Scott <[sfoss@blm.gov](mailto:sfoss@blm.gov)> wrote:

This Secretarial Order (3349) goes along with the EO on "Energy Independence" that was signed on Tuesday. It sort of completes the set.

S

On Thu, Mar 30, 2017 at 8:18 AM, Foss, Scott <[sfoss@blm.gov](mailto:sfoss@blm.gov)> wrote:

Hi David,

I sent Kenshu a list of bills (with links) in the 115th Congress that, if enacted, could affect paleo resources. Many of those could have implications for Bears Ears. This EO is about energy extraction, but it does call for actions to be lawful, so I don't think it would directly affect work in monuments, but would definitely affect paleontological resources outside and near monuments. Extraction activities put pressure on paleo resources, but also provide the opportunity to discover and access paleo resources (when we have the ability to be part of the process).

With respect to Bears Ears there is an interesting conversation going on right now (see two articles, one appended, one attached).

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AN E&E NEWS PUBLICATION

## NATIONAL MONUMENTS

### **Grijalva baits Bishop on Antiquities Act**

**Jennifer Yachnin, E&E News reporter**

*Published: Wednesday, March 29, 2017*

Arizona Rep. Raúl Grijalva, the top Democrat on the House Natural Resources Committee, is challenging Chairman Rob Bishop to introduce legislation to reform the Antiquities Act, accusing the Utah Republican of attempting to dismantle national monuments via "a behind-the-scenes legal strategy."

In a statement issued yesterday, Grijalva took aim at his counterpart, who has been a vocal critic of the 1906 law that allows presidents to designate land as monuments to protect objects of historic or scientific interest.

Along with other members of Utah's all-GOP delegation, Bishop has argued that the Antiquities Act can be used both to create and dismantle such sites, including the recently created 1.35-million-acre Bears Ears National Monument in southeast Utah.

Both Bishop and Sen. Mike Lee (R-Utah) are set to speak at an event in Washington, D.C., tonight hosted by the Pacific Legal Foundation and American Enterprise Institute on that subject.

The event, titled "Presidential Authority to Revoke or Reduce National Monument Designations," will focus on a new paper by AEI legal scholar John Yoo and PLF's Todd Gaziano.

In his statement, Grijalva criticized the GOP-aligned briefing and noted that the Natural Resources Committee has not held a hearing on the status of any monuments since Bishop became chairman in 2015.

"We can disagree about whether our federal lands should be protected or turned over to extraction industries, but let's do our jobs and have that debate with our colleagues about real legislation," Grijalva said.

Although Bishop has previously sponsored or co-sponsored measures that would prevent new national monuments in Utah or require congressional approval for such monuments, he has yet to do so in this session. Bishop did, however, author a change to the House rules this year that designates federal land transfers as cost-free (***E&E Daily***, Jan. 6).

"Chairman Bishop has the power to introduce a bill that puts his ideas into practice, discuss its merits and hold a vote whenever he chooses," Grijalva continued. "Rather than trying to convince a small handful of people to support a behind-the-scenes legal strategy, let's see what happens when he asks our colleagues to vote against our country's public lands when the cameras are rolling."

A committee spokesman declined to comment on Grijalva's statements.

Although Congress may opt to abolish monuments via legislation, it has done so fewer than a dozen times. It has, however, converted about 50 national monuments to national parks or preserves ([Greenwire](#), Feb. 8).

While both state and federal GOP lawmakers from Utah have criticized the Bears Ears monument — as well as the older Grand Staircase-Escalante National Monument created by President Clinton — their aim has largely been to urge President Trump to rescind the designations for those sites or reduce their size.

A handful of monuments have been reduced by previous commanders in chief, but to date, no president has sought to undo a monument's status. Conservationists also suggest that any move by Trump to reduce a monument's boundaries would spark a legal challenge, asserting that the president does not have authority to amend monuments, but only to create them.

But in a December [op-ed](#) in *The Wall Street Journal*, published shortly after President Obama designated the Bears Ears site, Yoo and Gaziano argued that because Congress has granted power to presidents to create monuments, that means a commander in chief can undo those designations.

"After studying the president's legal authority, we conclude that he can rescind monument designations — despite the cursory but contrary view of Attorney General Homer Cummings in 1938," Yoo and Gaziano wrote. "While Congress could limit it further, the law's text and original purposes strongly support a president's ability to unilaterally correct his predecessors' abuses."

The duo point to Congress' ability to rescind regulations issued by the executive branch, as well as a president's ability to remove appointed officials even after they have been approved by the Senate.

"Similarly, presidents have the constitutional authority to terminate a treaty, even though they need Senate advice and consent to make it," Yoo and Gaziano wrote.

The pair's new paper on whether Trump can amend or rescind monuments is under embargo until this evening's event.

But Grijalva pointed to an [analysis](#) published earlier this month by law firm Arnold & Porter that argues presidents have not been given authority to undo monuments.

"The Antiquities Act and subsequent legislation reserved to Congress, which has Constitutional authority over public lands, the sole power to revoke such a designation," the analysis states.

The analysis highlights the Federal Land Policy and Management Act, enacted in 1976, which reserved for Congress "the authority to modify and revoke withdrawals for national monuments," while also arguing that removing monuments included in the National Park System would violate federal laws that prohibit derogation of the park system.

The firm also criticized Yoo and Gaziano's interpretation of the Antiquities Act, writing that allowing a president to rescind a monument would be equivalent to "a usurpation of congressional powers by the Executive Branch."

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On Wed, Mar 29, 2017 at 3:15 PM, Polly, P. David <[pdpolly@indiana.edu](mailto:pdpolly@indiana.edu)> wrote:

Sigh. Among many other questions, do you think this will put pressure on Bears Ears, Grand Escalante, or other areas that have paleo resources?

On 29 Mar 2017, at 2:49 PM, Foss, Scott <[sfoss@blm.gov](mailto:sfoss@blm.gov)> wrote:

Just out today:

<https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economy-1>



# Presidential Authority to Revoke or Reduce National Monument Designations

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JOHN YOO AND TODD GAZIANO

MARCH 2017

AMERICAN ENTERPRISE INSTITUTE

# Executive Summary

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The Antiquities Act of 1906 grants the president the power to designate national monuments in order to protect archeological sites, historic and prehistoric structures, and historic landmarks, such as battlegrounds. We are confident that, pursuant to this power to designate, a president has the corresponding power to revoke prior national monument designations, although there is no controlling judicial authority on this question. Based on the text of the act, historical practice, and constitutional principles, we have even more confidence that he can reduce the size of prior designations that cover vast areas of land and ocean habitat, although his power of reduction may in some instances be related to his implicit power of revocation.

An attorney general opinion in 1938 concluded that the statutory power granted to the president to create national monuments does not include the power to revoke prior designations. The opinion has been cited a few times in government documents, including by the solicitor of the Interior Department in 1947 (although for a different proposition) and in legal commentary, but the courts have never relied on it. We think this opinion is poorly reasoned; misconstrued a prior opinion, which came to the opposite result; and is inconsistent with constitutional, statutory, and case law governing the president's exercise of analogous grants of power. Based on a more careful legal analysis, we believe that a general discretionary revocation power exists.

Apart from a general discretionary power to revoke monuments that were lawfully designated, we think the president has the constitutional power to declare

invalid prior monuments if they were illegal from their inception. In the first instance, there is no reason why a president should give effect to an illegal act of his predecessor pending a judicial ruling. Beyond this, we think the president may also have a limited power to revoke individual monument designations based on earlier factual error or changed circumstances, even if he does not possess a general discretionary revocation power.

In addition to the above powers, almost all commentators concede that some boundary adjustments can be made to monument designations, and many have been made over the years. In 2005, the Supreme Court of the United States implicitly recognized that such adjustments can be made. The only serious question is over their scope. No court has ruled on this question. Some commenters claim this is because no president has attempted to significantly reduce the size of an existing monument, but that is simply inaccurate. In the act's early years alone, some monuments were reduced by half or more.

Regardless of past practice, arguments that limit the president's authority to significantly reduce prior designations are largely conclusory and based on the erroneous premise that the president lacks authority to revoke monuments or driven by a selective reading of the act's purpose rather than its text. We believe a president's discretion to change monument boundaries is without limit, but even if that is not so, his power to significantly change monument boundaries is at its height if the original designation was unreasonably large under the facts as they existed then or based on changed circumstances.

# Presidential Authority to Revoke or Reduce National Monument Designations

BY JOHN YOO AND TODD GAZIANO

As he left the Oval Office, President Barack Obama tried to exempt his environmental policies from the effects of the November 2016 elections. Five days before Christmas, the White House announced the withdrawal of millions of acres of Atlantic and Arctic territory from petroleum development. Obama continued his midnight orders by proclaiming 1.35 million acres in Utah and 300,000 acres in Nevada to be new national monuments. White House officials claimed that both types of actions were “permanent” because there was no express authority to reverse them. But that gets the constitutional principles and legal presumptions exactly backward. All the ex-president will prove is the fleeting nature of executive power.

These actions, like many others taken by the Obama administration, will remain vulnerable to reversal by President Donald Trump. In our constitutional system, no policy can long endure without the cooperation of both the executive and legislative branches. Under Article I of the Constitution, only Congress can enact domestic statutes with any degree of permanence. And because of the Constitution’s separation of powers, no policy will survive for long without securing and retaining a consensus well beyond a simple majority. Our nation’s most enduring policies—antitrust, Social Security, and civil rights—emerged as the product of compromise and deliberation between the political parties.

President Obama’s refusal to compromise with his political opponents will guarantee that his achievements will have all the lasting significance of Shelley’s King Ozymandias.<sup>1</sup> The president’s only substantial

legislative victories, Obamacare and Dodd-Frank, never gained bipartisan input or broad support. Trump executive appointees can begin unraveling both laws with executive actions, with legislation to significantly alter them to follow. President Obama’s refusal to yield an inch to Republicans intensified their opposition over many years and created a powerful electoral consensus to reverse these alleged reforms. The coming fight over public lands shows, in microcosm, the constitutional dynamics that render Obama’s legacy so hollow.

## Background on Antiquities Act National Monument Designations

The original motive for the Antiquities Act of 1906 was to protect ancient and prehistoric American Indian archeological sites on federal lands in the southwest from looting. The Antiquities Act was passed during the same month (June 1906) as the act creating Mesa Verde National Park, and the problems that arose in protecting the Mesa Verde ruins inform the Antiquities Act’s central focus. In a report to the secretary of the interior, Smithsonian Institution archeologist Jesse Walter Fewkes described vandalism at Mesa Verde’s Cliff Palace:

Parties of “curio seekers” camped on the ruin for several winters, and it is reported that many hundred specimens there have been carried down the mesa and sold to private individuals. Some of these objects

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are now in museums, but many are forever lost to science. In order to secure this valuable archaeological material, walls were broken down . . . often simply to let light into the darker rooms; floors were invariably opened and buried kivas mutilated. To facilitate this work and get rid of the dust, great openings were broken through the five walls which form the front of the ruin. Beams were used for firewood to so great an extent that not a single roof now remains. This work of destruction, added to that resulting from erosion due to rain, left Cliff Palace in a sad condition.<sup>2</sup>

The legislative history of the Antiquities Act on the Department of Interior website provides additional historical detail,<sup>3</sup> but the act's text confirms that its primary purpose was to "preserve the works of man."<sup>4</sup> Section 1 of the original act made it a crime to "appropriate, excavate, injure, or destroy any historic or prehistoric object of antiquity" on federal land without permission. Section 3 provided for permits for the examination of "ruins, the excavation of archeological sites, and the gathering of object of antiquity upon" federal land. Section 4 provided the authority to the relevant department secretaries who managed federal land to issue uniform regulations to carry out the act's provisions. Section 2, which allows for the designation of national monuments and the reservation of such federal land as is necessary to protect the objects at issue, also focuses primarily on "historic and prehistoric structures, and other objects of historic or scientific interest" (emphasis added).

The addition of only two words, "historic landmarks," in that sequence in Section 2 (see below) denotes something broader than preserving human artifacts. In prior proposals to protect antiquities, the Department of Interior had sought authority for scenic monuments and additional national parks, but Congress repeatedly rejected that authority.<sup>5</sup> Congress was annoyed by large forest designations and guarded its authority over western lands jealously.<sup>6</sup> Yet the final language has been used and abused for such purposes, or effectively for such purposes since the official designation of national parks is still left to Congress.

As previously mentioned, Section 2 of the Antiquities Act not only allows protection for small areas around human archeological sites but also authorizes the president:

in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and maintenance of the objects to be protected.

There are three steps to land being reserved and protected under the Antiquities Act, the first two of which are delineated in the section above. First, the monument must be declared for a protective purpose upon lands owned or controlled by the United States. Second, a reservation of certain parcels of land that constitute a "part thereof" may be made, but such parcels of land may not exceed what is necessary to protect the "objects" at issue. And third, the president may specify certain restrictions or other protections that apply to the land thus reserved for the monument in the initial proclamation, or the relevant department secretary who has responsibility to manage the monument may issue regulations consistent with such protections.<sup>7</sup>

Although the act's final language covered more than antiquities, and there is evidence that small scenic landmarks were contemplated, the statute's title, drafting history, and historical context may still be valuable to presidents who want to follow the text and spirit of the original law. For example, earlier and contemporaneous bills for the same purpose limited monument designation to 320 or 640 acres.<sup>8</sup> The final bill replaced that with the (now seemingly open-ended) requirement that such monuments "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected," but that was added to provide flexibility for special situations and not to allow a million-acre designation. Such

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background also helps illuminate earlier presidential abuses, whether such abuses rise to the level of a statutory violation or are just garden-variety political acts that offend individual due process rights and separation of powers principles.

Besides Mesa Verde National Park, only a handful of other national parks existed in 1906. Congress did not create the National Park Service to manage them until 1916. The Grand Canyon, for example, was not a national park in 1906 and was open to mining claims and other federal program leases.

President Theodore Roosevelt initially used his new Antiquities Act authority to protect some relatively small landmarks (e.g., Devils Tower) and Native American ruins (e.g., El Morro and Montezuma Castle), but his abuses were not long in coming. In 1908, he proclaimed the Grand Canyon National Monument, reserving more than 808,000 acres for its protection. Although later Congresses converted some national monuments covering large geological formations into national parks, including the Grand Canyon National Park in 1919, the Congress that enacted the Antiquities Act did not intend monuments of that size to be established by presidential designation.

Nevertheless, the Supreme Court relied on the validity of the 1908 reservation that created the Grand Canyon National Monument in rejecting a private mining claim in *Cameron v. United States*.<sup>9</sup> There is no indication that the size of the original monument designation was at issue, perhaps because Congress had recently converted the monument into a national park. Yet the Supreme Court also has considered issues relating to two other large monuments or former monuments.<sup>10</sup> While the original monuments' sizes were not challenged in any of these cases, it is unclear whether the courts will invalidate large geological monument designations due to their size alone.<sup>11</sup>

Even so, the Antiquities Act's primary motivation and historical context is still legally relevant to refute the arguments of those who would limit a president's revocation power based on a selective and misleading statement about its purpose. Moreover, other interpretive questions remain open, such as the meaning of the textual requirement that the lands being reserved

under the monument designations are "owned or controlled" by the United States.

Three of the most important Indian lands where prehistoric artifacts might be looted were not even states in 1906; Arizona, New Mexico, and Oklahoma were then federal territories. Hawaii was only recently annexed and organized as a territory, and Alaska was still a sparsely settled American "district" after the gold rushes of the 1890s—not yet an official federal territory. These were areas of exclusive federal ownership and control.

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**The Congress that  
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presidential designation.**

Other areas of the West that included early national monument designations were owned by the national government, so an issue of control short of ownership was not at play in any of those designations. That may be relevant to the type of control Congress intended as a predicate to the exercise of authority under the Antiquities Act. (See later discussion regarding marine areas, especially those not owned by the United States and subject to limited regulation or control.)

**A General Discretionary Power to Revoke  
Prior Designations**

Attorney General Homer Cummings advised President Franklin Roosevelt in 1938 that he lacked the authority to revoke President Calvin Coolidge's

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designation of the Castle Pinckney National Monument because he concluded that no power existed to revoke a prior monument designation.<sup>12</sup> Although the opinion has been cited in some later government documents<sup>13</sup> and by legal commentators, no court has ruled on the president's revocation power or cited the opinion, in part because no president has attempted to revoke a prior designation. In all events, the 1938 attorney general opinion is poorly reasoned, and we think it is erroneous as a matter of law.

The attorney general was first authorized to issue legal opinions to the president under the Judiciary Act of 1789, now codified at 28 U.S.C. §§ 511-513, and to other agency heads by that act and other delegations of authority from the president. Attorney general opinions, and those that now are issued by the Department of Justice (DOJ) Office of Legal Counsel (OLC), are binding on executive branch agencies. In contrast, a president is free to disregard them especially if he concludes that his oath to take care that the laws are faithfully executed conflicts with such an opinion.

Nevertheless, prudence dictates that the next president request that his own attorney general reexamine such opinion, perhaps with the assistance of OLC, which became an independent division of the DOJ in 1951 and is commissioned to provide serious legal analysis on such matters. The existence of Cummings' 1938 published opinion is an internal hurdle that any administration should address, preferably with another published opinion, either affirming, qualifying, or overruling Cummings' advice.

In 1938, Cummings addressed the question of whether the secretary of the interior could abolish the Castle Pinckney National Monument in Charleston, South Carolina, and transfer the land to the War Department. Under the Antiquities Act, President Coolidge had formed the monument in 1924 from a US fort that had existed in the Charleston harbor since the early 19th century. As Cummings observed, the Antiquities Act contained no clear textual authorization to "abolish" national monuments. "If the President has such authority, therefore, it exists by implication."<sup>14</sup>

Cummings concluded that without clear authorization from Congress, President Roosevelt could

not reverse the designation of Castle Pinckney as a national monument. In a brief opinion, he relied on two grounds. First, he believed Attorney General Edward Bates had settled the issue in an 1862 opinion that found that the president could not return a military reservation to the pool of general public lands available for sale. Second, he compared the Antiquities Act to other federal laws governing temporary withdrawals of federal land or forests, which explicitly provide for presidential modification of past designations. In addressing past practice, which he conceded supported a right to reduce the size of national monuments, Cummings argued that "it does not follow from power so to confine that area that he has the power to abolish a monument entirely."<sup>15</sup>

We believe the 1938 opinion is wrong in some obvious respects and too cursory to be persuasive, even if its errors were excised. One major flaw is Cummings' misreading of Bates' opinion,<sup>16</sup> 44 years before the enactment of the Antiquities Act. Bates' opinion discusses whether an administration in the 1840s could rescind a military reservation in Illinois for which Congress had appropriated money and on which a fort had been constructed. He found that the statute delegating to the president the power to designate land for military purposes did not include a power to withdraw the designation. Bates seemed to believe that delegated power, once used, could not be activated to reverse the decision that the president had effectively exhausted the delegation of power. "A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can."<sup>17</sup>

But the original 1862 opinion contains many factual and legal distinctions that Cummings does not address. For example, Bates states that he is interpreting military reservation authority under "early acts of Congress" and an "act of 1809," which provided appropriations for constructing forts "for the protection of the northern and western frontiers." Perhaps most importantly, the 1862 opinion acknowledges that the

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military reservation itself could be abandoned by the War Department, which is the equivalent of revoking a land reservation under the Antiquities Act. It also relies on the fact that in 1858, Congress had specifically repealed any statutes that authorized the sale or transfer of military sites to the public. Of course, no such express statutory prohibition on the presidential withdrawal of national monument status exists in the Antiquities Act.

Instead, Bates' opinion focuses on whether an abandoned military reservation and its buildings would be subject to "entry or preemption by settlers." This refers to the Preemption Act of 1841, which allowed squatters on federal land during the 1840s and 1850s to secure title to it at a low price (preempting a general public sale) if they also worked it for a number of years.<sup>18</sup> To conclude that squatters could not simply enter the military reservation and secure title to it "by preemption," Bates' opinion relies on a combination of factors that are distinguishable from revoking a monument designation under the Antiquities Act, including: the unnamed "early acts of Congress," which authorized its initial selection as a military reservation; the 1809 appropriation for military forts on the frontier; that Fort Armstrong had been constructed and occupied for more than two decades; that its buildings were still in good order; that other laws governed the sale of abandoned military property; and more recent acts of Congress relating to the particular piece of property, which assumed it was not subject to preemption by settlers.

Cummings did not acknowledge these and other potential distinctions. Bates found that separate laws governed the management and disposal of military property from the homesteading or preemption laws that had populated Kansas and Nebraska. It is not surprising that interpreting different statutes yields different results, but even so, Bates conceded that an improved military reservation could be abandoned and sold, just not pursuant to the Preemption Act of 1841. Cummings mistakenly read the 1862 opinion for the proposition that once land is reserved under any act of Congress, that reservation can never be rescinded.

In contrast to the question Bates addressed, revoking a monument designation under the Antiquities

Act would not change the federal ownership of the land at issue. For this and other reasons, the portion of the 1862 opinion that Cummings quoted is especially questionable as applied to land reservations under the Antiquities Act. The quoted language also contains several inapt analogies and question-begging propositions of law.

For example, Cummings quotes the proposition that the "power to execute a trust, even discretionarily, *by no means* implies the further power to undo it when it has been completed" (emphasis supplied). The italicized phrase is misleading. Not every grant of a power to create something must include the power to abolish it, but many do. Special circumstances might make revoking certain acts impossible, or that power might be withheld, but a presumption of revocability is often implied if the grant is silent.<sup>19</sup>

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Indeed, reliance on trust law should have led to the opposite conclusion, at least under the Antiquities Act. Under general trust principles, at least in the 20th and 21st centuries, the power to create a trust includes the power to revoke it when the settler retains an interest in it, unless the trust is expressly irrevocable under the original grant of authority.<sup>20</sup> If a court applied trust law principles to the Antiquities Act, we think it would conclude that the president retains an interest in the monument designations he or a predecessor creates, including that he has the duty to manage them, issue and enforce regulations to protect them, and adjust their borders from time to time with subsequent presidential proclamations. Moreover, the broader principle of trust law is that

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the party creating the trust has the power to decide whether it is revocable; the discretionary nature of the president's power under the Antiquities Act and certain textual cues suggest Congress did not intend to make all monument reservations permanent.

Cummings' reliance on Bates' constitutional-statutory analysis fares no better than his reliance on trust law. It is true that a president has no general constitutional authority to manage federal land, although he may have some limited powers as commander in chief or under other statutory grants of authority. That, however, does not answer whether Congress' grant of authority in "early acts of Congress" or the Antiquities Act of 1906 to make reservations includes the power to rescind or revoke them. Indeed, Bates conceded that military reservations could be abandoned; he just believed the land would not be subject to "preemption by settlers." In the context of the Antiquities Act that Cummings was supposed to interpret, a president could rescind or amend the parcels of land reserved for a given monument without repealing the underlying monument designation. There is no evidence that Congress intended to withhold either revocation power in the Antiquities Act, let alone both of them.

Bates' final constitutional-statutory proposition is equally circular as applied to the Antiquities Act. He asserts that reading the unnamed "early acts of Congress" and especially the 1809 appropriation to allow "preemption by settlers" would effect a repeal of the underlying laws: "To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will." That presidents cannot unilaterally repeal statutes does not answer whether Congress included the power both to make and revoke reservations in the original grant of authority under the Antiquities Act.

Cummings' only attempt at an original argument starts and ends with one of the Antiquities Act's purposes: "to preserve . . . objects of national significance for the inspiration and benefit of the people of the United States." Cummings then immediately concludes, in *ipse dixit* fashion (without making a coherent argument), that: "For the reasons stated above, I am of the opinion that the President is without

authority" to issue a proclamation revoking the Castle Pinckney National Monument.

Such casual reliance on one of the act's purposes, and one that was not set forth in the act itself, adds nothing of weight, since it does not explain why revoking the monument at issue was inconsistent with that general purpose of preserving objects of national significance. What if the president determined, for example, that no objects of national significance remained at a given site?

Cummings also does not fairly consider other purposes. If a textual ambiguity justified a resort to legislative materials, the full record would show that the act's primary purpose was to provide a power to the president to prevent the destruction and looting of artifacts until they were excavated and safeguarded or until Congress could consider long-term measures regarding the site. This more complete statement of purposes highlights that the passage of time matters and that a later president could reasonably conclude that Congress declined the opportunity to legislate on the land or objects in an earlier monument designation or that they were now safeguarded, such as by excavation and display in a museum.

A proper analysis of the revocation power under the Antiquities Act would also consider other grants of authority to the president in the Constitution and other statutes and how the courts and constitutional practice have treated them. Cummings made no effort to do that in 1938, and the range of presidential action the courts have upheld, even under older delegations dating to the post-Civil War era, is now more muscular than in early-20th-century jurisprudence.

Although our research is limited on analogous delegations, we believe the general principle would prevail that the authority to execute a discretionary government power usually includes the power to revoke it unless the original grant expressly limits the power of revocation. One particularly relevant statutory example is the executive's power to issue regulations pursuant to statutory authority. When Congress gives an agency the discretionary authority to issue regulations, it is presumed to also have the authority to repeal them.<sup>21</sup> This is especially true when the regulation has shown to be contrary to the

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purposes underlying the statute.<sup>22</sup> Section 4 of the Antiquities Act grants three department secretaries the power to publish “from time to time uniform rules and regulations for the purpose of carrying out this Act.” Although Congress did not expressly state that the officials can repeal or significantly alter their regulations once they are published “from time to time,” that is presumed by law. The broader power of revocation by the president should also be presumed.

Constitutional law axioms are even more relevant in undermining Cummings’ view. A basic principle of the Constitution is that a branch of government can reverse its earlier actions using the same process originally used. Thus, Article I, Section 7, of the Constitution describes only the process for enacting a federal law. A statute must pass through both bicameralism (approval of both Houses of Congress) and presentment (presidential approval). But the Constitution describes no process for repealing a statute.

Under the Obama administration’s logic, Congress could not repeal previous statutes because of the Constitution’s silence. Since the adoption of the Constitution, however, our governmental practice is that Congress may eliminate an existing statute simply by enacting a new measure through bicameralism and presentment. While passage of an earlier law may make its repeal politically difficult, due to the need to assemble majorities in both Houses and presidential agreement, no Congress can bind later Congresses from using their legislative power as they choose.

This principle applies to all three branches of the federal government. The Supreme Court effectively repeals past opinions simply by overruling the earlier case, as most famously occurred in *Brown v. Board of Education*,<sup>23</sup> which overruled *Plessy v. Ferguson*.<sup>24</sup> While the Court may follow past precedent out of *stare decisis*, it also employs the same procedure to reverse the holding of past cases, as Congress does to reverse an earlier statute. Both a precedent and its subsequent overruling decision require only a simple majority of the justices. No Supreme Court can bind future Supreme Courts.

This rule also applies to the Constitution as a whole. In Article V, the Constitution creates an additional process for amending its own text, which

requires two-thirds approval by the House and the Senate and then the agreement of three-quarters of the states. Without this additional option in Article V, the Constitution would require the same or a similar process for its amendment as for its enactment, which would have impractically required a new constitutional convention. Reinforcing our point, the framers decided to set out explicit mechanisms for repealing part of the original constitutional text when they wanted to provide a means that did not mirror the original enacting process.

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## No president can bind future presidents in the use of their constitutional authorities.

The same principle applies to the constitutional amendments themselves. The Constitution contains no provision for undoing a constitutional amendment. Instead, the nation has used constitutional amendments to repeal previous constitutional amendments. The 21st Amendment repealed Prohibition, which had been enacted by the 18th Amendment. When the Constitution is silent about a method for repeal, it is assumed that we are to use the same process as that of enactment.

The executive branch operates under the same rule. No president can bind future presidents in the use of their constitutional authorities. Presidents commonly issue executive orders reversing, modifying, or even extending the executive orders of past presidents, and no court has ever questioned that authority, even when it is used to implement statutorily delegated powers. Good examples include the successive executive orders Presidents Ford, Carter, Reagan, Clinton, George W. Bush, and Obama used to specify how the congressionally mandated rulemaking process would be conducted and reviewed in the executive branch.<sup>25</sup> It would be quite an anomaly to

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identify an executive directive or presidential proclamation that a subsequent president could not revoke.

Presidents also regularly add or remove executive branch officers appointed to White House committees or even the cabinet. They have created and eliminated whole offices in the Executive Office of the President. They have increased or reduced the use of cost-benefit analysis in regulatory decisions. In fact, when the Constitution deviates from this lawmaking symmetry, it explicitly does so in the text and in a manner that makes repeal easier than the first affirmative act.

The most famous example is the president's removal power. In Anglo-American constitutional history, the executive power traditionally included the power both to hire and fire subordinate executive officials. The Constitution altered the appointment process. Under Article II, Section 2, the president can nominate and, with the Senate's advice and consent, appoint high executive branch officers, judges, and ambassadors. The Constitution, however, did not explicitly address removing an officer.

In *Myers v. United States*,<sup>26</sup> the Supreme Court found that the Constitution implicitly retained the traditional rule that a president could unilaterally undo an appointment without the Senate's approval. In revoking an official's commission that was issued after Senate confirmation, the president is more clearly negating a specific, deliberative, and official Senate act. By contrast, revoking a predecessor's individual monument designation does not negate anything in particular that Congress approved.

A similar dynamic applies to the Treaty Clause. Under Article II, Section 2, of the Constitution, the president can make treaties subject to the advice and consent of the Senate. Again, the Constitution does not explicitly address terminating a treaty. But as a four-justice plurality of the Supreme Court and the US Court of Appeals for the DC Circuit have found, the president retains the traditional executive authority to unilaterally terminate treaties.<sup>27</sup> Past presidents and Senates cannot bind future presidents to treaties, just as they cannot prevent future presidents from removing executive branch officials.

Although the power to unilaterally abrogate a treaty flows from a grant of constitutional authority

to the president to manage foreign relations, Congress is also constitutionally prohibited from delegating a statutory power to the president and then micromanaging the discretion granted.<sup>28</sup> Thus, even if the Antiquities Act attempted to prevent later presidents from using its authority to reverse an earlier monument designation, that would raise serious constitutional questions.

At a minimum, a thorough and up-to-date analysis of both constitutional principles and statutory examples should be performed before Cummings' opinion is followed.

### **A Limited Power to Revoke Certain National Monuments or Declare Others Invalid**

Even if every monument designation cannot be revoked as a matter of presidential discretion, and we still question such limitation, authority might still exist to abolish some designations based on an earlier factual error, changed circumstances, or an original statutory violation. In short, three determinations, two factual and one legal, may provide strong grounds for certain monument revocations or invalidations.

**New Factual Determinations.** First, if the president concludes that the original designation was mistaken, perhaps because of an archeological fraud, historical error, or improved or updated scientific analysis, the predicate for original designation would be undermined. It would be hard to argue that Congress intended that every curiosity deemed scientifically interesting to a president 100 years ago (the once popular but now discredited and racist branch of human craniology/phrenology comes to mind) forever must remain a valid source of scientific interest and protection. It might be more controversial for a president to determine that a geological monument designation thought to be rare and scientifically interesting by an earlier president is not all that worthy of protection as a monument, but limiting such reevaluation would elevate certain determinations (or

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privilege geological claims) over others in a manner that would be hard to logically sustain.

Second, as explained above, the act also was intended to provide authority to preserve artifacts that might otherwise be looted. Even assuming the original designation was proper, if the relevant artifacts were excavated and removed and are now on display in a museum off-site, how can it be said that the reserved parcels are currently the “smallest areas compatible with the proper care and management of the objects to be protected”? If any of these changes of fact or scientific interest justify revocation, then the general argument against revocation would be on shaky grounds, and discretionary revocations at will would be a more plausible interpretation of the act.

**Problems of Size.** A presidential determination that the original designation was illegally or inappropriately large is a special case. It may provide a sound predicate for declaring a designation to be invalid in some cases or for significantly reducing the monument’s size in others. The president might be presented with an issue analogous to a severability determination regarding such monuments. If there is no reasonable way to reduce a reservation’s size and maintain a meaningful monument, rescinding or declaring invalidity may be more appropriate. In all events, a review of controversies over the size of national monuments highlights three distinct periods of use and abuse, the last of which contains the most breathtakingly large monument designations.

Between 1906 and 1943, most monument reservations were smaller than 5,000 acres, and many of them actually protected antiquities. Yet there also were several large monument reservations or expansions during that period, mostly for scenic or geological formations.

President F. Roosevelt’s designation of Jackson Hole National Monument in 1943 was the catalyst for two reforms, only one of which was made permanent. Wyoming congressmen were strongly opposed to the 210,950-acre Jackson Hole monument and reservation and secured a bill to overturn it, but President Roosevelt vetoed it. In 1950, Congress made Grand Teton National Park out of most of the land from the Jackson

Hole monument and added the southern portion of the former monument to the National Elk Refuge. That law also amended the Antiquities Act, forbidding further use of it to expand or establish a national monument in Wyoming without express congressional authorization.<sup>29</sup> Note that the proviso enacted in 1950 does not prohibit the president from reducing the size of the monument reservation in Wyoming.

For 35 years after the congressional dispute over the Jackson Hole National Monument, presidents were quite temperate in their use of the Antiquities Act. Except for a couple of proclamations of large tracts by President Johnson, the period between 1943 and 1978 contained no especially vast monument reservations, and some presidents even reduced the size of older monuments. Eisenhower’s combined proclamations under the act caused a net reduction in total acreage devoted to national monuments. President Nixon issued no Antiquities Act proclamations whatsoever.

In 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA), which prevents a secretary of interior from withdrawing more than 5,000 acres of federal land without congressional approval. The FLPMA did not alter the president’s authority under the Antiquities Act, perhaps because presidential abuses had abated. Although one ambiguous sentence of one House committee report has been mistakenly read to provide otherwise, the plain text of the FLPMA and settled canons of construction establish that the president’s authority under the Antiquities Act was not affected by a provision that limited the secretary of interior’s authority regarding similar land withdrawals.<sup>30</sup>

Unfortunately, presidential abuses under the Antiquities Act expanded significantly after 1978, especially by Presidents Carter, Clinton, and Obama. Until a few months ago, President Carter held the record for the most extensive monument reservations, with nine designations that were larger than a million acres and two larger than 10 million acres. Carter’s designation of more than 56 million acres of monument reservations in Alaska on a single day led to the most recent amendment to the Antiquities Act.

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The Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, was enacted by Congress and signed by President Carter on December 2, 1980, after his election loss to Reagan and the impending loss of Democratic Party control in the Senate. The ANILCA settled many long-standing issues and land disputes, and it made many Alaska-specific changes to laws governing federal land management, including requiring congressional approval for national monuments in Alaska larger than 5,000 acres.<sup>31</sup> Whether this congressional reaction made an impression on them or for other reasons, Presidents Reagan and George H. W. Bush both issued no proclamations under the Antiquities Act.

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## **Several of President Obama's proclamations were also in the teeth of strong congressional opposition and undermined pending congressional legislation.**

Nevertheless, President Clinton broke new ground with the number of monument designations per term,<sup>32</sup> many of which were larger than 100,000 acres and two of which were larger than one million acres.<sup>33</sup> He also proclaimed a questionable new type of monument on the high seas. President George W. Bush issued fewer than half as many monument designations as Clinton, and some were relatively small. Yet, President George W. Bush made a few large monument designations, including a questionable designation along the Pacific Ocean's Marianas Trench.<sup>34</sup>

President Barack Obama broke both Clinton's record number of monument proclamations per term and Carter's record for the total acres withdrawn.

Among his 34 proclamations,<sup>35</sup> Obama enlarged the Papahanaumokuakea Marine National Monument by approximately 283.4 million acres,<sup>36</sup> enlarged the Pacific Remote Islands Marine National Monument by approximately 261.3 million acres,<sup>37</sup> and created the Northeast Canyons and Seamounts Marine National Monument, which covers approximately 3.1 million acres.<sup>38</sup>

Several of President Obama's proclamations were also in the teeth of strong congressional opposition and undermined pending congressional legislation. For example, on December 28, 2016, he created the 1.35 million-acre Bears Ears National Monument in southern Utah and the 300,000-acre Gold Butte National Monument in Nevada. Both designations were opposed by state officials and GOP congressional leaders, including the unanimous congressional delegation from Utah, which was willing to compromise on a smaller monument in Utah that permitted reasonable public uses of the area. The protective impact of the Bears Ears National Monument is particularly dubious since it is supposed to protect isolated Native American sites. It is unclear, for example, how the agency officials will protect those sites any differently after the monument designation than they might have before.

A designation smaller than 5,000 acres may still be too large (relative to some objects being protected) or politically abusive if the designation is for a questionable purpose, for example, to interfere with congressional deliberations over a compromise land-use arrangement or to regulate fishing that is not otherwise authorized. But reservations larger than 5,000 acres merit special review out of respect for Congress' traditional authority to establish federal land policy, especially if there was no "emergency" necessitating the monument designation without congressional action or if congressional leaders had expressed serious opposition to the monument designation.

If a president makes a credible determination, based on the facts and a reasonable interpretation of the act, that some former monuments are illegally large relative to the original "object" supposedly being protected, he could declare that the initial designation was void, especially if there is no easy way to make it lawful by severing discrete parcels of land.

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That is distinct from his power to “revoke” those he thinks were originally lawful, and it would stem from his constitutional authority to take care that the laws are faithfully executed. Even so, a president trying to insulate such a decision should invoke both his constitutional authority to declare the prior designation void and his authority under the act to revoke the designation if it were legal. If he uses both sources of authority, he should issue a proclamation to exercise his authority under the Antiquities Act.

### **Judicial Review**

Someone would have to establish standing to sue to overturn a later declaration of invalidity or a revocation, and that might be quite difficult in many cases. Standing has been a hurdle for many challenging monument designations that impaired grazing, timber, mining, or other rights to use the reserved land.<sup>39</sup> It might be even more difficult for a party to establish a sufficient and particularized injury that resulted from a monument revocation that restores land to public use.

If standing is established, challengers would have to satisfy different burdens, depending on the nature of their claims. A challenge to the president’s legal authority to establish a particular monument, perhaps because the land in question is not owned or controlled by the United States,<sup>40</sup> is an issue of law that ought to be decided without deference to either party. A legal challenge to the president’s authority to ever revoke any prior monument under the act would probably be decided in a similar manner.

Someone challenging the president’s discretionary determinations under the act would likely have to show an abuse of discretion and to do so without an administrative record. And it is possible, absent proof of corruption, legal violation, or a failure of process, that certain factual determinations are committed to the president’s discretion by law and are not subject to judicial review.<sup>41</sup> That standard might apply to presidential determinations that justify a reduction in the size of existing monuments, which is discussed further below.

### **Special Questions Regarding Marine Monument Designations**

The Supreme Court has upheld or discussed the application of the act to the submerged lands of two different monuments along the coast and inland waterways,<sup>42</sup> but some issues regarding these kinds of monuments still remain open, and recent marine monument designations on the high seas raise new questions.

The submerged lands under inland waterways and territorial seas at issue in the two cases mentioned above were owned by the United States when the monuments were designated. That is not true with the areas associated with certain high-sea designations by Presidents Clinton, George W. Bush, and Obama. President Obama’s most recent purported designation of the Northeast Canyons and Seamounts Marine National Monument is located approximately 130 miles off Cape Cod. This approximately 3.14 million-acre monument is in the United States’ Exclusive Economic Zone (EEZ), but under domestic and international law, America does not own it. The Pacific Legal Foundation recently filed suit on behalf of a coalition of New England fishing organizations challenging the legality of the most recent marine monument, which is the first lawsuit of its kind.<sup>43</sup>

There are two problems with the designation of marine monuments far from shore under the Antiquities Act. First, the submerged land at issue is not the type of land that the United States could have owned or controlled in 1906. The modern EEZ is not only vastly wider than the “territorial waters” of 1906 but also a qualitatively different type of property interest than the United States may have acquired or controlled in an earlier era.<sup>44</sup> The United States had a sovereign interest in the submerged land near its coast and its territorial waters (whether that was then three miles from the coast and is now 12 miles), which justifies sovereign military and economic controls; it could not have and still does not have such a sovereign interest in the area beyond its territorial waters.<sup>45</sup> Relatedly, even current domestic and international law permits only limited regulation or control of the marine and wind resources in the EEZ outside our

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territorial waters, and thus, it does not constitute the type of federal government “control” of the relevant land that is required under the Antiquities Act.

In *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*,<sup>46</sup> the Fifth Circuit held that the Antiquities Act does not extend beyond the territorial sea, despite subsequent legislation authorizing federal regulation beyond it. Although the Fifth Circuit acknowledged that the federal government’s role in regulating beyond the territorial seas had expanded since 1906, including through the adoption of the Outer Continental Shelf Lands Act,<sup>47</sup> none of that conveyed the degree of control that the federal government enjoyed on federally owned lands or federally controlled territories in 1906.<sup>48</sup>

When President Clinton proposed to designate the first marine monument beyond American territorial waters, he received some surprising pushback from the Departments of Interior and Commerce, which submitted a joint memorandum to OLC asserting that the EEZ is not “owned or controlled by the Federal Government.” OLC ultimately disagreed but acknowledged that it was a “closer question” than earlier disputes over the president’s designation authority.<sup>49</sup>

We believe that the OLC opinion is flimsy and that the attorney general or White House counsel should request a reconsideration of it as well. The Clinton-era OLC opinion argues that the EEZ is sufficiently controlled by the federal government because recent presidents have consistently asserted *some* regulatory authority over the area and the United States has greater regulatory authority than any foreign government.<sup>50</sup> Of course, the same is true of many areas that are unquestionably *not* “owned or controlled by the Federal Government.”

Private lands in the United States, for instance, are subject to federal regulation under the Commerce Clause, and no other nation can claim an authority to regulate them. But this does not mean the president has the authority to unilaterally designate privately owned lands as a monument. The Antiquities Act confirms this, stating that the president can receive privately owned lands to include them in a monument, but only through the owner’s voluntary

relinquishment of them.<sup>51</sup> The OLC opinion cannot be squared with this.

It also asserts that the EEZ is sufficiently controlled by the federal government because it has the authority to protect threatened or endangered species found there.<sup>52</sup> Yet the same could be said of any privately owned land under the Endangered Species Act.<sup>53</sup>

The OLC opinion has other problems, but its main defect is the failure to effectively grapple with the federal government’s limited power to regulate in the EEZ. Rather than address whether this affects the president’s ability to designate a monument in this area, the opinion instead argues that the regulations imposed within the monument are limited by the customary international law that otherwise applies. However, that cannot be squared with the Antiquities Act. In 1906, land owned or controlled by the federal government described federally owned land and federal territories in which the federal government had almost no limits on its authority and could exercise its full police power. Consistent with that, the Antiquities Act *requires* monuments to be regulated as necessary to effectuate the statute’s purposes. For these reasons, we think the OLC opinion in 2000 is erroneous.

Finally, even if the Antiquities Act does allow monument designations in international submerged lands in the United States’ EEZ, such designations might be valid only for the seabed itself and for the purpose of seabed protection. If so, that would provide additional authority to revoke designations that are primarily designed to protect sea life in international waters and remove other restrictions in ocean habitat, even if they are above seabed features that might be the subject of protection. To be clear, other authority exists to regulate fishing and other activity in the oceans, but it is questionable whether the Antiquities Act provides such authority.

The act’s text provides strong support for limiting monuments to landmarks and objects on the land and further limits reservations relating to such monuments to parcels “of land.” In particular, the act provides authority for monument designations of only “*landmarks, historic and prehistoric structures, and other objects* of historic or scientific interest that are

situated *upon the land*,” and when such monuments are designated, the president may then “reserve as part thereof parcels of *land*” for protection (emphasis supplied). There may be some ancillary power to regulate the air above a monument or some activity in the sea above a marine monument (see discussion of *Cappaert v. United States* below), but it is doubtful that the ocean itself and its living denizens can be designated as part of the monument. It is equally doubtful that a reservation of land can encompass the water column as a matter of presidential discretion under the Antiquities Act.

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## The act’s text provides strong support for limiting monuments to landmarks and objects on the land and further limits reservations relating to such monuments to parcels “of land.”

In *Cappaert*, the Supreme Court upheld some authority to regulate the immediate watershed outside a monument if that is necessary to protect geologic structures and endangered wildlife in the monument grounds, but its holding was based on other federal law governing reserved water rights.<sup>54</sup> The Court did mention the endangered fish that swim in the unmoving pool of the monument at issue, but that reference does not seem necessary to its holding that appurtenant water outside the monument was reserved. The facts of that case are distinguishable in other ways from the unbounded ocean and the

unthreatened fish, mammals, and other sea creatures that swim in and out of it.

*Yates v. United States*<sup>55</sup> supports one such distinction. If a “fish” is not a “tangible object” within the meaning of Sarbanes-Oxley law because it is not like the other listed things that should be protected from shredding,<sup>56</sup> then it is even less likely that the ocean and its sea life are objects analogous to “structures” and “landmarks” that are “situated upon the land” within the meaning of the Antiquities Act. And even if the ocean and its sea life are “objects” that could be part of a monument, the Antiquities Act’s second step permits the reservation of only the “part thereof” that are “parcels of land” necessary to protect them.

Accordingly, if the ocean and its sea life cannot be designated as part of a monument, or if no reservation “of land” can include them, then their regulation must rely on some other principle of law (analogous to the federal law regarding reserved water rights) and perhaps on proof that such regulation is necessary to protect the landmark, structure, or other objects of historic or scientific interest at issue in the actual monument, such as the seamounts and underwater valleys or mountains. For these reasons, the president should be free to lift erroneous fishing restrictions that are in place solely by reason of a marine monument designation.

### The Power to Reduce the Scope of a Reservation Pursuant to a Monument Designation

Almost all commentators, including past opinions from the attorney general and the solicitor of interior, agree that monument boundary adjustments are permissible.<sup>57</sup> Environmentalists often seek large expansions of existing monuments. As a result, several presidents have added vast additional reservations to existing national monuments, including three by President Obama that added millions of acres to them. Many presidents have made other boundary adjustments, including some modest to large reductions, and the Supreme Court has cited some of these

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changes in describing the monuments at issue, implicitly assuming they were valid.

If large additions of land have been deemed necessary to protect certain objects, it is doubtful the president could not determine that some large reductions are reasonable or necessary to satisfy the “smallest area” requirement of the act. Modern technology might even help justify a reduction, for example, if smaller boundaries may now be more effectively monitored and protected.

Yet several commentators claim that the question of whether the president could affect significant reductions remains open.<sup>58</sup> No court has ruled on the scope of downward boundary adjustments. Several commenters assert that the absence of judicial authority is because no president has attempted a significant reduction in the land reserved for a monument, but that is not true. According to the National Park Service:

- President Eisenhower reduced the reservation for the Great Sand Dunes National Monument by 25 percent. (He reduced the original 35,528-acre monument by a net 8,920 acres.)<sup>59</sup>
- President Truman diminished the reservation for Santa Rosa Island National Monument by almost half. (The original 9,500-acre reservation by F. Roosevelt was diminished by 4,700 acres.)<sup>60</sup>
- Presidents Taft, Wilson, and Coolidge collectively reduced the reservation for Mount Olympus by almost half, the largest by President Wilson in 1915 (cutting 313,280 acres from the original 639,200-acre monument).<sup>61</sup>
- The largest percentage reduction was by President Taft in 1912 to his own prior reservation in 1909 for the Navajo National Monument. (His elimination of 320 acres from the original 360-acre reservation was an 89 percent reduction.)<sup>62</sup>

There are many other reductions or adjustments to monument boundaries, but the above reductions are significant by any measure.

It is surprising that some scholars who claim expertise in this area have accepted and repeated the mistaken assertion that no substantial reductions have been made. More importantly, their position that significant reductions might be prohibited is based on a selective reading of the act’s purposes and personal policy arguments instead of the text, and it is often built on the premise that authority to repeal or rescind a prior designation does not exist, including an uncritical reliance on Attorney General Cummings’ questionable opinion in 1938. Under this reading of the Antiquities Act, monuments may be significantly enlarged by later presidents but never significantly reduced absent an act of Congress.

For many of the same reasons that we reject a limitation on the president’s revocation power, we also question limitations on his power to substantially reduce the size of existing monument reservations. Moreover, we think there are additional reasons why the president has broad authority to alter the parcels of land reserved under existing monument designations, including logical inferences from textual provisions and the varied reasons prior presidents have given for boundary reductions that do not suggest clear limitations.

One textual command supporting boundary adjustments is that the act requires reservations to be “in all cases . . . confined to the smallest area compatible with the proper care and management of the objects to be protected.” There is no temporal limit to this requirement, and some presidential proclamations adjusting the boundaries of existing monuments recognize a continuing duty to review and comply with it. Even if boundary adjustments to date had all been somewhat minor, which is not the case, it is hard to read into the text a limiting principle that allows large additions but not large reductions.

Another textual hook is the discretionary nature of the president’s authority under the Antiquities Act. The relevant language in Section 2 states that it is “in his discretion” whether to declare the national monument. It then states that he “*may* reserve as part thereof parcels of land” to protect the objects at issue (emphasis added). The parcels must, as noted above, be confined to the smallest *area* compatible with the

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protective purpose, but it is still up to the president's discretion which precise parcels to designate. Apart from reducing the overall size, the next president may determine that a given monument with a patchwork of private inholdings is better protected by concentrating the monument within the federal land that the government owns and controls.<sup>63</sup> There is nothing in the act that privileges the original designation and regulations over a later presidential determination.

Moreover, there are more fundamental questions about how best to manage and protect federal property near national monuments with available resources. The belief that increasing federal regulation is always the best means of protecting something is more ideologically than empirically based, especially when it excludes all other options. Cooperation with state authorities and private property owners who own adjoining land often promotes better land-use decisions, including better protections for such properties. Such consultation and multiparty agreements tend to increase support for the resulting decisions and increase fundamental fairness, since some prior designations have walled in private lands and restricted the reasonable use of such private property.

The evidence surrounding many recent monument designations also suggests that some of the largest geological and scenic monuments were not motivated exclusively or even primarily by a desire to protect an "object" of historic or scientific interest as much as to lock up natural resources from development and use regardless of how limited or temporary the surface disturbances would be. Such actions not only create economic hardship for local communities and injustice to those who may have reasonably depended on the timber, grazing, or mineral resources, but they may actually be counterproductive to the ecological and environmental interests that past presidents claimed to protect. For example, prohibiting fishing in vast grounds in the Atlantic or Pacific Oceans where fishermen have engaged in sustainable practices forces more concentrated activity in other areas that may trigger unsustainable impacts.

Such large monument reserves also contribute to an estimated \$13.5 to \$20 billion maintenance backlog

on Department of Interior land-management responsibilities<sup>64</sup> and deny the federal government any reasonable return on land-use fees and leases. "Limited resources" was the primary justification for several of President Obama's executive actions that redirected enforcement resources from broader narcotics and immigration enforcement policies to those Obama designated as more important narcotics and immigration priorities. A more careful accounting of federal land policy might lead a president to conclude that some vast monument reserves, under the Antiquities Act and other acts, diffuse attention and resources from higher priorities and contribute to environmental degradation, soil erosion, and other forms of mismanagement of federal property.

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## **Prohibiting fishing in vast grounds in the Atlantic or Pacific Oceans where fishermen have engaged in sustainable practices forces more concentrated activity in other areas that may trigger unsustainable impacts.**

Apart from all that, increasing public use of vast tracts of federal land should be sufficient grounds for reducing certain prior monument reservations. The facts that underlie one Supreme Court case may prove instructive in defining possible grounds for monument reductions.

In *Alaska v. United States*,<sup>65</sup> the Supreme Court affirmed its special master's recommendation regarding the federal versus state ownership of certain

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submerged lands underwater near Alaska's southeast coast. Some of the land in dispute was under Glacier Bay, which is now a national park. Glacier Bay was first reserved as a national monument by President Coolidge's proclamation in 1925 and later enlarged by President F. Roosevelt's proclamation in 1939, both pursuant to the Antiquities Act. In describing the relevant lands in question, the Court also noted that President Eisenhower "slightly altered" the monument's boundaries in 1955.

The Supreme Court accepted without discussion that the addition by Roosevelt and the "altered" boundaries by Eisenhower were valid. The monument was made part of the Glacier Bay National Park by an act of Congress in 1980, but since the status of the land in 1959 (when Alaska was made a state) was the critical focus of its analysis, the national park act was not particularly relevant to that determination. The Court did not discuss the Eisenhower proclamation further, but that proclamation reduced the size of the Glacier Bay National Monument in three ways without any land swaps or additions to counter those reductions. More importantly, the grounds Eisenhower provided for that reduction are historically interesting and legally relevant.

In Proclamation 3089 on March 31, 1955,<sup>66</sup> Eisenhower reduced the size of Glacier Bay National Monument for three different reasons. One ground was that some lands "including several homesteads which were patented prior to the enlargement of the monument [by Roosevelt] are suitable for a limited type of agriculture use and are no longer necessary for the proper care and management of the object of scientific interest on the lands within the monument." Although Proclamation 3089 provides no further explanation of this exclusion, it is fair to read it as concluding that the original inclusion of this land was mistaken and, perhaps as important, that the lands were *no longer* necessary for the proper care of the objects of scientific interest in the monument.

The second reduction in the size of Glacier Bay National Monument was based squarely on Eisenhower's conclusion that such lands should have been included in Tongass National Forest instead

of the national monument in 1939, when Roosevelt enlarged it, "and such lands are suitable for national-forest purposes." Eisenhower determined that the earlier inclusion of these lands in the monument was in error, since their exclusion from the forest was "erroneous." He did not specifically declare that they were "no longer necessary" to the proper care of the objects of scientific interest in the Glacier Bay National Monument, but he must have concluded they were never necessary to be included or that the mistaken inclusion in 1939 was sufficient to exclude them in 1955.

The third reduction (the first mentioned in the proclamation) was because certain lands are "now being used as an airfield for national-defense purposes and are no longer *suitable* for national-monument purposes" (emphasis supplied). How land reserved in a national monument became a military airfield is not explained. In some respects, this may be the most interesting exclusion of all. Whether the earlier use of the land for an airfield was legal or not, Eisenhower asserted the authority to declare a higher government purpose for federal land that was part of a national monument and, by proclamation, to remove it from the national monument reservation. Note also that Eisenhower states that the airfield land was no longer *suitable* for inclusion in the national monument *because it was an airfield*, not that the land was otherwise unsuitable for inclusion in the monument. Would the same reasoning apply if it were not yet an airfield?

And while Eisenhower's total reductions in the size of Glacier Bay National Monument were not great relative to the monument's overall size, they were not trivial either. According to the National Park Service, the reductions total more than 4,100 acres of submerged land and 24,900 acres of other land.<sup>67</sup> Most national monuments before 1955 were not 29,000 acres, so the reductions were large in an absolute sense. Moreover, some of President Eisenhower's other monument reductions constituted a larger proportion of the original size of the monument (e.g., Great Sand Dunes), and earlier presidential reductions were even greater, as discussed above.

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Attempts to argue from the act’s broad purposes that significant reductions would not be authorized are as conclusory as Cummings’ analysis of the revocation issue. Reasoning from selective, broad protective purposes can always yield the desired result. We reach the opposite conclusion based on the text discussed above and consideration of all the act’s purposes, the original compromises the act incorporated, and separation of powers principles.

Subsequent congressional land-management statutes do not change the Antiquities Act, but they cut sharply against the policy argument that the act’s use is necessary to promptly secure land that is otherwise prone to looting or harmful development. Indeed, these more recent laws provide the same or superior protection without undermining Congress’ primary role in federal land-use decisions. Of special note, the secretary of interior now has statutory authority to make emergency withdrawals of federal land with few limitations (and none relating to size), including land not under his department’s jurisdiction, which expire no later than three years after they are withdrawn.<sup>68</sup>

Thus, one cannot truthfully defend the president’s power to lock up land from reasonable public uses in perpetuity as an “emergency” measure to stop imminent harm, no matter how often some make this claim. Yet monument declarations do have one powerful, immediate effect: They stop or inhibit ongoing congressional debate and potential compromise over the land at issue which is often the unstated goal. Congress has withdrawn many federal lands for heightened protection, but its background law and representative principles balance the interests of multiple stakeholders. Defenders of Antiquities Act abuse regularly implore the president to preempt or interfere with Congress’ deliberations. Even so, they cannot reasonably argue that presidential authority under the act can work only in one direction and that the interest of the states and other citizens cannot be reconsidered.

Returning to the text of the act, we have previously noted that it would have to be tortured extensively to yield a manageable standard that allows permissible “minor” boundary changes and large “additions”

but forbids “significant” reductions. Eisenhower’s Proclamation 3089, and perhaps others, proves that reductions have been recognized as valid even without further additions or other “enhancements” based on later presidential determinations. It was enough for a president to declare that certain lands: (1) were mistakenly included in the original designation, (2) are no longer necessary to be included, or (3) serve some higher federal purpose.

If the president can revoke prior monuments altogether, there is no strong argument that he lacks a lesser power to significantly reduce the land withdrawn for one. But even if the president lacks the power to revoke a monument, past practice includes proclamations that reduced some monuments to a fraction of their current size, such as President Taft’s 89 percent reduction of the Navajo Nation Monument. Moreover, we think the courts are more likely to uphold significant reductions if the president could credibly include in his determination that the original designation was inappropriately large relative to the object to be protected or has become so with changed circumstances.

It would bolster his position if the president includes any existing site-specific justifications for reducing the particular monument’s land reservation. For example, a president might issue a proclamation determining that limited resources prevent proper management of the largest national monuments, that other authority now exists for the excluded parcels to be regulated and managed (including perhaps a management plan for them), that changed technology or other changed circumstances allow a smaller area to be designated to protect the objects in question, or that other changed circumstances warrant such reductions.

The president’s authority to significantly reduce the size of an existing monument would be less certain if the Supreme Court or other appellate court ruled that he lacked a general discretionary authority to revoke prior monument designations. But even then, we think the president would retain the authority, if not the duty, to reduce the size of existing monuments that were unreasonably large relative to the objects being preserved or have become illegally

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large with changed circumstances. And such determinations should be entitled to the same or similar respect as the original reservations.

As with a complete revocation, someone would have to establish standing to sue to overturn a proclamation reducing the size of a monument, and that might be difficult in many cases. And even if standing is established, we think the challenger would have a significant burden to prove in order to prevail. If the challenge were based on a factual determination, such a challenger might have to prove an abuse of discretion to overcome the president's more recent determinations under the act, or the courts might hold that some determinations under the act are textually committed to the president's absolute discretion (absent corruption or a procedural failure) and not subject to judicial review.

### **The Power to Modify a Monuments' Management Conditions and Restrictions**

In addition to revoking a monument or significantly altering its boundaries, a president could change some of the restrictions on management grounds if he determines that it still properly protects the "objects" of scientific or historic interest. Accordingly, a president could "transfer the management of a monument from one agency to another; expand, authorize, or prohibit uses such as mining or grazing; or allow new rights-of-way across the lands."<sup>69</sup> Recent monument proclamations tend to contain more detailed management plans than earlier proclamations,<sup>70</sup> which relied on the statutory authority of the agency secretary delegated to oversee the monument to issue regulations for managing it.<sup>71</sup>

Restrictions or allowances set forth in the original proclamation would need to be changed by a subsequent proclamation, unless the proclamation delegated that authority to the relevant agency official. Although the FLPMA limits the power of the secretary of interior to modify or revoke an actual monument designation or the land withdrawn, it does not change the secretary's power under the Antiquities

Act to alter the monument's management plan when that is consistent with the underlying proclamation.

There should be no doubt that the president can modify land-use restrictions. As early as 1936, President Franklin Roosevelt issued a proclamation expressly making the restrictions on Katmai National Monument "subject to valid claims under the public-land laws . . . existing when the proclamations were issued and since maintained."<sup>72</sup> And nothing in the act's text limits the president's authority to change restrictions or uses for the land withdrawn.

Nevertheless, those who believe revocation is not permissible also raise questions about the "scope of this authority . . . to the extent that greatly reducing a monument's restrictions or expanding its uses can be analogized to effectively abolishing the monument."<sup>73</sup> That is not an inconsistent argument, but it is based almost entirely on the flawed premise that presidents are prohibited from revoking or significantly reducing the land withdrawn for any prior monument.

### **Conclusion**

We have argued that the president retains a general discretionary power to revoke prior monument designations pursuant to the Antiquities Act. It is a general principle of government that the authority to execute a discretionary power includes the authority to reverse the exercise of that power. This power is at its height when prior designations were made illegally or in contravention of the act's mandate that designations be reasonable in size.

Moreover, the purpose of the act supports the president in his ability to respond to new factual determinations or changes in circumstance that require modification of a monument's boundaries. The plain language of the act, its legislative purpose, and the practice of past presidents all support this conclusion. Most importantly, it is compelled by the constitutional principle of separation of powers. If presidents choose not to protect their policies through Congress' bicameral process, they leave those policies vulnerable to their successors by constitutional design.

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Cover image: Valley of the Gods in Bears Ears National Monument, Bureau of Land Management, Creative Commons. Photo by Bob Wick, BLM, <https://www.flickr.com/photos/mypubliclands/31136248533>.

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# Notes

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1. Percy Shelley's 1818 poem "Ozymandias" is about the ruins of an ancient kingdom, whose stern but long dead ruler declared it would last forever and make men tremble in despair. All that remains in modern times is a wrecked statue of the king, his boastful claim on its pedestal, and sand all around. For the text and history of the poem, see *Economist*, "The Real Ozymandias: King of Kings," December 18, 2013, <http://www.economist.com/news/christmas specials/21591740> enthusiasms rivalries fads and fashions lie behind Shelleys best known. Poetry and rulers vainly asserting the permanence of their works, however, are more timeless.
2. US Department of Interior, Rept. to Secretary of the Interior for Fiscal Year Ended June 30, 1909, 486 87.
3. Ronald F. Lee, "The Antiquities Act, 1900 1906," in *The Story of the Antiquities Act* (National Park Service, March 15, 2016), [https://www.nps.gov/archeology/pubs/lee/Lee\\_CH6.htm](https://www.nps.gov/archeology/pubs/lee/Lee_CH6.htm).
4. See Pub. L. 59 209, 34 Stat. 225 (June 8, 1906), now codified at 54 U.S.C. §§ 320301 03.
5. See Lee, "The Antiquities Act, 1900 1906," discussing Congress' refusal in the period before the Antiquities Act to pass five bills that sought to grant the secretary of the interior broad authority for designating national parks.
6. Ibid. ("The reluctance of the members of the Public Lands Committee, most of them western public lands states, to grant general authority to the Executive Branch to create new national parks is understandable in the light of their past experience with the timber reservations act of 1891.")
7. Although the National Park Service currently manages most existing national monuments, other units of the Department of Interior (the Bureau of Land Management and the US Fish and Wildlife Service) manage or comanage others. See list of national monuments and their corresponding management agencies at National Parks Conservation Association, "Monuments Protected Under the Antiquities Act," January 13, 2017, <https://www.npca.org/resources/2658> monuments protected under the antiquities act#sm.ooooopyorl7d8qfp5wxkeb7uvkeow. The original act contemplated that the Departments of Agriculture and Defense (then War) might also manage or relinquish land for national monuments and specified that the secretaries of interior, agriculture, and war had authority to jointly issue uniform regulations for managing national monuments. In recent decades, presidents have given responsibility to the National Oceanic and Atmospheric Administration (in the Department of Commerce) to manage or comanage marine monuments, and the US Forest Service (in the Department of Agriculture) manages or comanages certain other recent monuments.
8. See Lee, "The Antiquities Act, 1900 1906."
9. 252 U.S. 450 (1920).
10. See *United States v. California*, 436 U.S. 32 (1978); and *Alaska v. United States*, 545 U.S. 75 (2005), discussed in the section titled "Special Questions Regarding Marine Monument Designations."
11. See *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2001) (rejecting a challenge to the 327,769 acre Giant Sequoia National Monument as not constituting "the smallest areas compatible with proper care and management" of the objects being protected). Although the Supreme Court has not ruled expressly on a challenge to the excessive size of a monument, the courts have deferred to many presidential determinations under the act, and challengers may have to show an abuse of discretion to prevail on a size based claim. See discussion of judicial review in the section titled "Judicial Review." Nevertheless, *Tulare County* may be distinguishable in future challenges since the court held that the challengers failed to establish a factual basis for their claim, not that such a claim was barred. Consider one justification President Obama provided for creating the recent Bears Ears National Monument (see the section titled "Problems of Size"), which Utah officials have already said they will challenge: that it contains several ancient archeological sites. Although the proclamation also cited the area's cultural, geological, and historical significance, it is unclear how isolated archeological sites are better protected after a massive 1.35 million acre monument designation that incorporates all of them than before the designation, especially when the same two federal agencies (the US Forest Service and the Bureau of Land Management) will each manage the same areas after the designation as before it.
12. Proposed Abolishment of Castle Pinckney Nat'l Monument, 39 Op. Att'y Gen. 185 (1938).

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13. The solicitor of interior cited the opinion in 1947 but for a different proposition, namely that the president can alter the boundaries of a national monument. See “National Monuments,” *Interior Decisions* 60 (1947): 9.

14. 39 Op. Att'y Gen. 186.

15. *Ibid.*, 188.

16. Rock Island Military Reservation, 10 Op. Att'y Gen. 359 (1862).

17. *Ibid.*, 364.

18. The Homestead Act of 1862 revised this law, significantly reducing the number of “preemption” claims. But Bates was addressing the rights of settlers who may have occupied the former military property before 1862.

19. See Uniform Trust Code: Revocation or Amendment of Revocable Trust § 602(a) (2010) (“Unless the terms of a trust expressly provide that the trust is irrevocable”).

20. See Restatement (Third) of Trusts: Power of Settlor to Revoke or Modify § 63 (2003).

21. See, e.g., Commonwealth of Pa. v. Lynn, 501 F.2d 848, 855 56 (D.C. Cir. 1974).

22. See *ibid.*

23. 347 U.S. 483 (1954)

24. 163 U.S. 537 (1896).

25. Exec. Orders Nos. 11821, 39 F.R. 41501 (1974) (Ford); 12044, 43 F.R. 12661 (1978) (Carter); 12291, 46 F.R. 13193 (1981) (Reagan); 12866, 58 F.R. 51735 (1993) (Clinton); 13258, 67 F.R. 9385 (2002), and 13422, 72 F.R. 2763 (2007) (G. W. Bush); and 13497, 74 F.R. 6113 (2009) (Obama).

26. 272 U.S. 52 (1926).

27. See *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979), vacated by *Goldwater v. Carter*, 444 U.S. 996 (1979); and *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002).

28. See *INS v. Chadha*, 462 U.S. 919 (1983).

29. 64 Stat. 849 (1950), codified at 54 U.S.C. § 320201(d) (“No extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress”).

30. The FLPMA expressly limits agency officials’ authority to “modify or revoke” national monuments created by the president under the Antiquities Act or other monuments created by Congress, but that simply confirms the natural reading of the Antiquities Act, which grants authority to the president alone to specify the parcels of land withdrawn for any monument created pursuant to the act. It should not be read to raise doubts about the president’s authority to modify or revoke national monuments, as two Congressional Research Service reports (R44687 and RS20647) have suggested. FLPMA §204(j), 43 U.S.C. § 1714(j) provides:

The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; *modify or revoke any withdrawal creating national monuments under [the Antiquities Act]*; or modify, or revoke any withdrawal which added lands to the National Wildlife Refuge System prior to October 21, 1976, or which thereafter adds lands to that System under the terms of this Act. (emphasis supplied)

This restriction on the secretary’s power creates no inference that Congress modified the president’s authority in the Antiquities Act, and repeals by implication are strongly disfavored even if such an inference existed. The opposite reading of the text is much stronger, i.e., that Congress knew how to write express limitations and that it would have listed the president if its restriction on the secretary of interior’s power was intended to bind the president. The lone sentence in a House report cited for the contrary view is, at best, itself ambiguous, but even unambiguous legislative history material is irrelevant when the statutory text is clear.

31. See 16 U.S.C. § 3213.

32. President Obama’s 34 designations also overtook the previous record set by President Franklin Roosevelt, with 32 monument proclamations. See Juliet Eilperin and Brady Dennis, “Obama Names Five New National Monuments, Including Southern Civil Rights Sites,” *Washington Post*, January 12, 2017, [https://www.washingtonpost.com/national/health-science/obama-names-five-new-national-monuments-including-southern-civil-rights-sites/2017/01/12/7f5ce78c-d907-11e6-9a36-1d296534b31e\\_story.html](https://www.washingtonpost.com/national/health-science/obama-names-five-new-national-monuments-including-southern-civil-rights-sites/2017/01/12/7f5ce78c-d907-11e6-9a36-1d296534b31e_story.html). All presidents since 1906 have issued such proclamations except Presidents Nixon, Reagan, and George H. W. Bush. National Park Service, “National

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Monuments Designated by Presidents 1906 2009,” [https://www.nps.gov/parkhistory/hisnps/NPSHistory/national\\_monuments.pdf](https://www.nps.gov/parkhistory/hisnps/NPSHistory/national_monuments.pdf). According to the National Parks Conservation Association, 157 monuments have been created under the Antiquities Act. See National Parks Conservation Association, “Monuments Protected Under the Antiquities Act.” A few have been abolished by Congress. See National Park Service, “About ‘Abolished’ Monuments,” March 15, 2016, <https://www.nps.gov/archeology/sites/antiquities/abolished.htm>. And the land constituting Papago Saguaro National Monument was conveyed to the state of Arizona for public purposes. See 54 U.S.C.A. § 320301 note, citing Pub. L. 92, 71st Cong., Apr. 7, 1930, c. 107, 46 Stat. 142.

33. See Albert C. Lin, “Clinton’s National Monuments: A Democrat’s Undemocratic Acts?,” *Ecology Law Quarterly* 29 (2002): 718 19.

34. Bryan Walsh, “President Bush’s Last Act of Greenness,” *Time*, January 6, 2009, <http://content.time.com/time/health/article/0,8599,1869917,00.html> (noting that President Bush will have “protected more ocean than anyone else in the world”).

35. Eilperin and Dennis, “Obama Names Five New National Monuments”; and Dana Varinsky, “Here’s Every Piece of Land Obama Has Put Under Protection During His Presidency,” *Business Insider*, January 16, 2017, <http://www.businessinsider.com/every-piece-of-land-obama-has-protected-2017-1/#cascade-siskiyou-national-monument-1>.

36. Papahānaumokuākea.gov, “President Announces Expansion of Papahānaumokuākea,” [http://www.papahanaumokuakea.gov/news/expansion\\_announcement.html](http://www.papahanaumokuakea.gov/news/expansion_announcement.html).

37. Bryan C. Howard, “US Creates Largest Protected Area in the World, 3x Larger Than California,” *National Geographic*, September 26, 2014, <http://news.nationalgeographic.com/news/2014/09/140924-pacific-remote-islands-marine-monument-expansion-conservation/>.

38. The White House, Office of the Press Secretary, “Fact Sheet: President Obama to Continue Global Leadership in Combating Climate Change and Protecting Our Ocean by Creating the First Marine National Monument in the Atlantic Ocean,” September 15, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/09/15/fact-sheet-president-obama-continue-global-leadership-combatting-climate>. See also the later section discussing unique problems with monument designations of submerged land under the high seas and a citation to Pacific Legal Foundation’s recent lawsuit challenging the legality of the Northeast Canyons and Seamounts Marine National Monument.

39. See *Utah Assoc. of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004) (cataloguing cases).

40. See the section titled “Special Questions Regarding Marine Monument Designations” for discussion of legal issues related to questionable marine monuments on the high seas.

41. See *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002) (discussing judicial review to challenge presidential designations under the Antiquities Act and applying an unclear but deferential standard of review to factual determinations under the act); and *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2001) (rejecting a challenge to the Giant Sequoia National Monument as not constituting “the smallest areas compatible with proper care and management” of the objects being protected).

42. See *United States v. California*, 436 U.S. 32 (1978); and *Alaska v. United States*, 545 U.S. 75 (2005).

43. Complaint, *Massachusetts Lobstermen’s Association, et al. v. Ross, et al.*, No. 1:17 cv 00406, (D.D.C. Mar. 7, 2017), 2017 WL 897829. The complaint is available at <https://www.pacificlegal.org/document.doc?id=2499+>. The authors both have affiliations with Pacific Legal Foundation. Todd Gaziano is the executive director of its DC Center and is one of the attorneys for the plaintiffs in the case. John Yoo recently joined the board of Pacific Legal Foundation.

44. See also Joseph Briggett, comment, “An Ocean of Executive Authority: Courts Should Limit the President’s Antiquities Act Power to Designate Monuments in the Outer Continental Shelf,” *Tulane Environmental Law Journal* 22 (2009): 403.

45. See Restatement (Third) of Foreign Relations Law § 514 cmt. C.

46. 569 F.2d 330 (5th Cir. 1978).

47. 43 U.S.C. § 1331 et seq.

48. See *Treasure Salvors*, 569 F.2d at 337 340.

49. See Randolph D. Moss, Mem. Op. for the Solicitor, Dep’t of the Interior; General Counsel, Nat’l Oceanic and Atmospheric Admin.; and General Counsel, Council on Environmental Quality (Sept. 15, 2000), [https://www.justice.gov/sites/default/files/olc/opinions/2000/09/31/op\\_olc\\_v024\\_p0183.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2000/09/31/op_olc_v024_p0183.pdf).

50. See *ibid.*, 196.

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51. See 54 U.S.C. § 320301.

52. See Moss, Mem. Op. for the Solicitor, Dep’t of the Interior, 197.

53. But see *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337 (D. Utah 2014).

54. See *Cappaert v. United States*, 426 U.S. 128 (1976) (“when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation”).

55. 135 S. Ct. 1074 (2015).

56. *Ibid.*

57. See *National Monuments*, 60 Interior Dec. 9 (1947), citing A. G. Cummings, 39 Op. Att’y Gen. 185 (1938).

58. Compare those who suggest there may be limitations on the president’s authority to revoke or significantly reduce past monument reservations, Mark Squillace, “The Monumental Legacy of the Antiquities Act of 1906,” *Georgia Law Review* 37 (2003): 473, 488; Lin, “Clinton’s National Monuments,” 707, 713; and Sanjay Ranchod, note, “The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act,” *Harvard Environmental Law Review* 25 (2001): 535, 552, with those who simply note that the issue remains open, Alexandra Wyatt, *Antiquities Act: Scope of Authority for Modification of National Monuments*, Congressional Research Service, November 14, 2016, 5, [http://www.law.indiana.edu/publicland/files/national\\_monuments\\_modifications\\_CRS.pdf](http://www.law.indiana.edu/publicland/files/national_monuments_modifications_CRS.pdf); Kelly Y. Fanizzo, “Separation of Powers and Federal Land Management: Enforcing the Direction of the President Under the Antiquities Act,” *Environmental Law* 40 (2010): 765, 822; Roberto Iraola, “Proclamations, National Monuments, and the Scope of Judicial Review Under the Antiquities Act of 1906,” *William & Mary Environmental Law & Policy Review* 29 (2004): 159; Scott Y. Nishimoto, “President Clinton’s Designation of the Grand Canyon Parashnat National Monument: Using Statutory Interpretation Models to Determine the Proper Application of the Antiquities Act,” *Journal of Environmental Law and Litigation* 17 (2002): 51, 54; Pamela Baldwin, *Authority of a President to Modify or Eliminate a National Monument*, Congressional Research Service, August 3, 2000, 3; and James R. Rasband, “The Future of the Antiquities Act,” *Journal of Land, Resources & Environmental Law* 21 (2001): 619, 626.

59. Michael M. Geary, “Chapter 5: Monumental Dunes,” in *Sea of Sand: A History of the Great Sand Dunes National Park and Preserve* (Norman, OK: University of Oklahoma Press, 2016).

60. President Harry S. Truman, Proclamation No. 2659 Eliminating Certain Lands from the Santa Rosa Island National Monument and Reserving Them for the Use of the War Department for Military Purposes (Aug. 13, 1945), <http://www.presidency.ucsb.edu/ws/index.php?pid=87038>.

61. Gail H. E. Evans, “Appendix A: A Chronology of the Public Domain,” in *Historic Resource Study* (National Park Service, 1983), [https://www.nps.gov/parkhistory/online\\_books/olym/hrs/appa.htm](https://www.nps.gov/parkhistory/online_books/olym/hrs/appa.htm).

62. Hal K. Rothman, “Chapter 2: Founding Navajo National Monument,” in *Navajo National Monument: A Place and Its People: An Administrative History* (National Park Service, 1991), [https://www.nps.gov/parkhistory/online\\_books/nava/adhi/adhize.htm](https://www.nps.gov/parkhistory/online_books/nava/adhi/adhize.htm).

63. See, e.g., *Wilkerson v. Dept. of the Interior*, 634 F. Supp. 1265 (D. Col. 1986), holding that the United States could not completely restrict travel on a preexisting right of way through a national monument.

64. Hearing before the Subcomm. on the Interior, Environment, and Related Agencies of the H. Committee on Appropriations, (2001) (statement of Anu K. Mittal and Frank Rusco), <http://www.gao.gov/assets/130/125531.pdf>.

65. 545 U.S. 75 (2005).

66. President Dwight D. Eisenhower, Proclamation No. 3089 Excluding Certain Lands from the Glacier Bay National Monument and Adding a Portion Thereof to the Tongass National Forest (Mar. 31, 1955), <http://www.presidency.ucsb.edu/ws/?pid=107264>.

67. Theodore Catton, “Chapter VII: Private Interests and A Second Boundary,” in *Land Reborn: A History of Administration and Visitor Use in Glacier Bay National Park and Preserve* (Anchorage, AL: National Park Service, 1995), [https://www.nps.gov/parkhistory/online\\_books/glba/adhi/chap7.htm](https://www.nps.gov/parkhistory/online_books/glba/adhi/chap7.htm).

68. 43 U.S.C. §§ 1714(e) and 1714(i).

69. Wyatt, *Antiquities Act*, 5. The Supreme Court has recognized the president’s power to shift responsibility to manage the land withdrawn in the initial proclamation declaring the monument from one agency to another, *California v. United States*, 436 U.S. 32, 40 (1978), and there is no reason to think the president cannot shift that responsibility again in subsequent proclamations.

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70. Compare President Barack Obama, Proclamation No. 9496 (Sept. 21, 2016), <https://www.gpo.gov/fdsys/pkg/DCPD-201600596/pdf/DCPD-201600596.pdf>, with President Franklin D. Roosevelt, Proclamation No. 1950 (April 24, 1931), reprinted in US Department of the Interior, Proposed Katmai National Park, Alaska: Final Environmental Statement 527 (1974).

71. See 54 U.S.C. 320302 (“The Secretary, the Secretary of Agriculture, and the Secretary of the Army shall make and publish uniform regulations for the purpose of carrying out this chapter”).

72. President Franklin D. Roosevelt, Proclamation No. 2177 (1936).

73. Wyatt, *Antiquities Act*, 5.



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# Presidential Authority to Revoke or Reduce National Monument Designations

John Yoo, Todd Gaziano

March 29, 2017 4:00 pm | *American Enterprise Institute*

## Key Points

- President Barack Obama's midnight executive actions to designate vast areas of Nevada and Utah as national monuments can be easily revoked by the new administration.
- The text, history, and executive practice under the Antiquities Act of 1906, as well as foundational constitutional principles, provide for presidential discretion in the creation and revocation of national monuments.
- Even if the president's discretion to revoke monuments is limited, his discretion to significantly reduce a monument's size is strongly supported by the text of the Antiquities Act, its legislative history and purposes, and unbroken presidential practice.

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## Executive Summary

The Antiquities Act of 1906 grants the president the power to designate national monuments in order to protect archeological sites, historic and prehistoric structures, and historic landmarks, such as battlegrounds. We are confident that, pursuant to this power to designate, a president has the corresponding power to revoke prior national monument designations, although there is no controlling judicial authority on this.

question. Based on the text of the act, historical practice, and constitutional principles, we have even more confidence that he can reduce the size of prior designations that cover vast areas of land and ocean habitat, although his power of reduction may in some instances be related to his implicit power of revocation.

An attorney general opinion in 1938 concluded that the statutory power granted to the president to create national monuments does not include the power to revoke prior designations. The opinion has been cited a few times in government documents, including by the solicitor of the Interior Department in 1947 (although for a different proposition) and in legal commentary, but the courts have never relied on it. We think this opinion is poorly reasoned; misconstrued a prior opinion, which came to the opposite result; and is inconsistent with constitutional, statutory, and case law governing the president's exercise of analogous grants of power. Based on a more careful legal analysis, we believe that a general discretionary revocation power exists.

Apart from a general discretionary power to revoke monuments that were lawfully designated, we think the president has the constitutional power to declare invalid prior monuments if they were illegal from their inception. In the first instance, there is no reason why a president should give effect to an illegal act of his predecessor pending a judicial ruling. Beyond this, we think the president may also have a limited power to revoke individual monument designations based on earlier factual error or changed circumstances, even if he does not possess a general discretionary revocation power.

In addition to the above powers, almost all commentators concede that some boundary adjustments can be made to monument designations, and many have been made over the years. In 2005, the Supreme Court of the United States implicitly recognized that such adjustments can be made. The only serious question is over their scope. No court has ruled on this question. Some commenters claim this is because no president has attempted to significantly reduce the size of an existing monument, but that is simply inaccurate. In the act's early years alone, some monuments were reduced by half or more.

Regardless of past practice, arguments that limit the president's authority to significantly reduce prior designations are largely conclusory—and based on the erroneous premise that the president lacks authority to revoke monuments—or driven by a selective reading of the act's purpose rather than its text. We believe a president's discretion to change monument boundaries is without limit, but even if that is not so, his power to significantly change monument boundaries is at its height if the original designation was unreasonably large under the facts as they existed then or based on changed circumstances.

## Introduction

As he left the Oval Office, President Barack Obama tried to exempt his environmental policies from the effects of the November 2016 elections. Five days before Christmas, the White House announced the withdrawal of millions of acres of Atlantic and Arctic territory from petroleum development. Obama continued his midnight orders by proclaiming 1.35 million acres in Utah and 300,000 acres in Nevada to be new national monuments. White House officials claimed that both types of actions were “permanent” because there was no express authority to reverse them. But that gets the constitutional principles and legal presumptions exactly backward. All the ex-president will prove is the fleeting nature of executive power.

These actions, like many others taken by the Obama administration, will remain vulnerable to reversal by President Donald Trump. In our constitutional system, no policy can long endure without the cooperation of both the executive and legislative branches. Under Article I of the Constitution, only Congress can enact domestic statutes with any degree of permanence. And because of the Constitution’s separation of powers, no policy will survive for long without securing and retaining a consensus well beyond a simple majority. Our nation’s most enduring policies—antitrust, Social Security, and civil rights—emerged as the product of compromise and deliberation between the political parties.

President Obama’s refusal to compromise with his political opponents will guarantee that his achievements will have all the lasting significance of Shelley’s King Ozymandias.<sup>1</sup> The president’s only substantial legislative victories, Obamacare and Dodd-Frank, never gained bipartisan input or broad support. Trump executive appointees can begin unraveling both laws with executive actions, with legislation to significantly alter them to follow. President Obama’s refusal to yield an inch to Republicans intensified their opposition over many years and created a powerful electoral consensus to reverse these alleged reforms. The coming fight over public lands shows, in microcosm, the constitutional dynamics that render Obama’s legacy so hollow.

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## Notes

1. Percy Shelley's 1818 poem "Ozymandias" is about the ruins of an ancient kingdom, whose stern but long-dead ruler declared it would last forever and make men tremble in despair. All that remains in modern times is a wrecked statue of the king, his boastful claim on its pedestal, and sand all around. For the text and history of the poem, see *Economist*, "The Real Ozymandias: King of Kings," December 18, 2013, <http://www.economist.com/news/christmas-specials/21591740-enthusiasms-rivalries-fads-and-fashions-lie-behind-shelleys-best-known> (<http://www.economist.com/news/christmas-specials/21591740-enthusiasms-rivalries-fads-and-fashions-lie-behind-shelleys-best-known>). Poetry and rulers vainly asserting the permanence of their works, however, are more timeless.

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